KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, D.C. 20007-5108

(202) 342-8400

FACSIMILE
(202) 342-8451
www.kelleydrye.com

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
MUMBAI, INDIA

DIRECT LINE: (202) 342-8531
EMAIL: gmorelli@kelleydrye.com

December 3, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172

Dear Ms. Dortch:

In a last chance attempt to stave off complete denial of its above-captioned petitions for forbearance from Section 251(c)(3) unbundling obligations, Verizon filed an *ex parte* letter on November 30, 2007 contending that its Petitions should be granted because "a significant percentage of wire centers in the six MSAs meet the 'coverage threshold test' that the Commission adopted in Omaha and Anchorage for determining where forbearance from unbundling relief is appropriate."[1] Verizon argues that forbearance is warranted based on a single test, *i.e.*, whether cable voice services could be made available to 75 percent of the homes in a wire center within a commercially reasonable period of time, and that the actual market penetration of cable (and other) facilities-based competitors is irrelevant to the Commission's forbearance determinations.[2] Verizon's characterization of the standard for determining when forbearance is warranted is incorrect as a matter of law and policy.

---

1 *See* Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 30, 2007) ("*Nov. 30th Verizon Ex Parte*"), at 1.

2 *Id.*, at 3-5.

In Verizon's view, actual competition and the tangible customer penetration achieved by facilities-based competitors in particular product and geographic markets is irrelevant to the Commission's finding of whether forbearance from Section 251(c)(3) is justified. Verizon is wrong. While the scope of coverage of facilities-based carriers' networks is relevant to the forbearance analysis, it is not the only element (or even the threshold aspect) of the forbearance analysis. The Commission made this clear in the *Anchorage Forbearance Order*, where it described the analytic framework adopted in the *Omaha Forbearance Order*[3] and applied that framework to the facts in the Anchorage study area. The Commission said:

> Most notably, we apply the same analytic framework to our analysis of the level of competition in the Anchorage study area in this proceeding that the Commission applied to its analysis of competition in the Omaha MSA. *In each case, the Commission begins by examining the level of retail competition to the incumbent LEC and the role of the wholesale market. The Commission then evaluates the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought.*[4]

Thus, the Commission has established and confirmed that when a petitioning party is seeking forbearance for an entire MSA (or multiple MSAs), the Commission must review the state of actual competition in the MSA before any analysis of facilities coverage in particular wire centers is warranted.[5] Here, the evidence unequivocally shows that the facilities-based market

---

3 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*" or "*Omaha*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) ("*Qwest Omaha*").

4 *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, at ¶ 9 (2007) ("*Anchorage Forbearance Order*" or "*Anchorage*"). *See also* Letter from John Nakahata, Counsel to EarthLink, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 21, 2007) ("*Nov. 21st EarthLink Ex Parte*"), at 2-3 (emphasis supplied).

5 The Commission's insistence that sufficient actual competition be found to exist in a particular product and geographic market before forbearance from Section 251(c)(3) is considered is consistent with the purposes and goals of that section. Congress's primary intent in promulgating Section 251(c)(3) was to open the incumbents' local exchange

share requirements of the *Omaha* and *Anchorage* orders have not been met in any of the six MSAs at issue.[6] Consequently, forbearance from Section 251(c)(3) unbundling requirements is not appropriate.[7]

It bears noting that Verizon is the architect of its own fate in this proceeding. As the petitioning party, Verizon in its sole discretion decided to seek forbearance on an MSA-wide basis in the six MSAs at issue. It could have sought forbearance for particular wire centers where it perceived that the facilities-based "coverage" was sufficient to meet that aspect of the framework established in the *Omaha Forbearance Order*.[8] It did not do so. Application of the *Omaha* precedent regarding the proper analytical approach to an MSA-wide forbearance request

---

networks to competitors and to foster the creation of sustainable facilities-based local competition from multiple providers.

6 *See, e.g.,* Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, WC Docket No. 06-172, (filed Mar. 5, 2007) ("*Broadview, et al. Comments*"); Reply Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, WC Docket No. 06-172, (filed Apr. 18, 2007) ("*Broadview, et al. Reply Comments*"); Letter from Broadview Networks, Inc., et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Sept. 4, 2007) ("*September 4th Ex Parte*"); Letter from Brad E. Mutschelknaus, Counsel to Covad Communications Group, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 5, 2007) ("*Nov. 5th Ex Parte*"); Letter from Brad E. Mutschelknaus, Counsel to Covad Communications Group, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 20, 2007) ("*Nov. 20th Ex Parte*").

7 The courts have repeatedly held that the Commission has broad discretion to craft standards to interpret and apply statutory provisions such as Section 251(c)(3). *See, e.g., Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 125 S. Ct. 2688 (2005); *Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

8 The undersigned parties do not intend to imply that if Verizon had petitioned for forbearance for particular individual wire centers it would have been entitled to forbearance in those wire centers merely by proving that the facilities coverage threshold established in the *Omaha Forbearance Order* had been met by a single competitor. The *Omaha* standard requires a far more robust analysis which includes, *inter alia*, a finding for each product market of more than one facilities-based competitor and a review of the state of wholesale competition.

is therefore highly appropriate.[9] Unfortunately for Verizon, application of the *Omaha* framework compels denial of Verizon's Petitions in their entirety.

Respectfully submitted,

Brad E. Mutschelknaus
Genevieve Morelli

Counsel to Broadview Networks, Inc., Covad Communications Group, NuVox Communications, and XO Communications, LLC

---

[9] Of course, as established in *Omaha* and reiterated in the *Anchorage Forbearance Order*, "each forbearance case must be judged on its own merits," and whether forbearance is appropriate must be determined "in light of market conditions in a particular local geographic area." *Anchorage Forbearance Order*, at ¶ 9.